82-369

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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

On Writ of Certiorari to the Court of Appeals For the Fourteenth Supreme Judicial District of Texas

PETITION FOR WRIT OF CERTIORARI

BRADLEY A. JACKSON
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380
Attorney for Petitioner
Gulf Offshore Company,
A Division of the Pool Company

Of Counsel:

CHARLES D. KENNEDY
ROYSTON, RAYZOR, VICKERY & WILLIAMS

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTION PRESENTED FOR REVIEW

Whether the rule of law regarding instructions to the jury that any award of damages would not be subject to federal income taxation established in *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490 (1980) is applicable and controlling in an action arising under the Outer Continental Shelf Lands Act?[1]

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1. This is precisely the same question raised in Petitioner's first Petition for Writ of Certiorari, Cause No. 80-590, granted by this Court on December 8, 1980. The case was argued March 31, 1981, and decided July 1, 1981. *Gulf Offshore Company, A Division of the Pool Company v. Mobil Oil Corporation*, 453 U.S. 473 (1981). This Court indicated the determinative inquiry to be: "does the incorporation of state law (by the Lands Act) preclude a court from finding that state law is 'inconsistent' with a federal common law rule generally applicable to federal damages actions?" 453 U.S. at 488. Declining to answer this question unless Louisiana law would *not* require that the tax instruction be given upon timely request, creating a clear conflict with federal law, this Court remanded the case to the Texas Court of Appeals to consider the law of Louisiana and, if necessary, the issue of conflict between federal and state law.

The question focused upon by this Court is now squarely presented as the Texas Court of Appeals held, on remand, that Louisiana law does not *require* the tax instruction, making it inconsistent with the federal rule articulated in *Liepelt*. The Court of Appeals further held that although the Lands Act's incorporation of state law does not *preclude* a court from finding that state law is inconsistent with federal law, the federal law rule of *Liepelt* is not "applicable federal law" in a Lands Act case, so that inconsistent state law, incorporated as federal law by the statute, nevertheless controls. The Supreme Court of Texas has again refused to hear the case, necessitating this second Petition for Writ of Certiorari on this obviously vital issue involving construction of a federal statute and application of federal law.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties to the proceeding in the court whose judgment is sought to be reviewed and, additionally, all parties and persons believed to be interested in the outcome of this Petition:

1. Mobil Oil Corporation, Respondent
   Arthur Levy Boat Service, Inc.
   L. A. Levy, Inc.
   Offshore Crews, Inc.
   Unknown underwriters at interest with the Levy entities, which assumed Respondent's defense.
2. Steven Gaedecke, Plaintiff
3. Jamail, Kolius & Mithoff, counsel for Plaintiff.
4. Employers' National Insurance Company, Intervenor.
5. Gulf Offshore Company, A Division of the Pool Company, Petitioner.[2]

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2. In accordance with the amendment of Rule 21.1(b) to refer to amended Rule 28.1, Petitioner takes this opportunity to advise that:

   1) Gulf Offshore Company, A Division of the Pool Company no longer exists as a separate entity, having been totally absorbed by Pool Company.
   2) The parent company of Pool Company is ENSERCH Corporation.
   3) The non-wholly owned subsidiaries of Pool Company are Pool Arabia, Ltd. and Pool Santana, Limited.
   4) Affiliates of Pool Company are the following members of the ENSERCH Corporation group, many of which themselves have subsidiaries: ENSERCH Finance N.V., Ebasco Services Incorporated, Enserch Domestic International Sales Corporation, Intairdril (Aust.) Ptv. Ltd., Irano-Intairdril S.S.K., Lone Star Gas Company of Texas, Inc., LSG Intragas, Inc., Lone Star Gathering Company, Solus Ocean Systems, Inc., Solus Ocean Systems La. Inc., Samson Ocean Systems, Inc., Associated Oiltools, Inc., Enserch Canadian Exploration, Inc., LS Energy, and Enserch Exploration, Inc.

6. Underwriters subscribing Policy No. J.F.X. 0007, issued to ENSERCH Corp. and Pool Offshore Company.

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A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas entered in the above-entitled case on January 28, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas on remand from this Court is reported at 628 S.W.2d 171 and is

printed in Appendix A to this Petition, *infra*, p. A-1. The Supreme Court of Texas denied Application for Writ of Error with the notation "no reversible error" and notification of such is printed in Appendix A, *infra*, p. A-11. The judgment of the District Court of Harris County is printed in Appendix A, *infra*, p. A-13. The opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas reviewed by this Court in *Gulf Offshore Company, A Division of the Pool Company v. Mobil Oil Corporation*, 453 U.S. 473 (1981), is reported at 594 S.W.2d 496 and is printed in Appendix A, *infra*, p. A-19.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 1982. A timely Motion for Rehearing was filed on February 12, 1982, and overruled on February 25, 1982. Application to the Supreme Court of Texas for Writ of Error, filed March 29, 1982, was refused without opinion with the notation "no reversible error" on May 5, 1982. Timely Motion for Rehearing, filed May 20, 1982, was overruled on June 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). [The opinion of the Court of Appeals deals in pertinent part with federally created rights under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1982).]

STATUTE INVOLVED

Section 1333 of Title 43 of the United States Code, as it appeared at all times pertinent to this litigation, had, in part, as its subject matter the jurisdiction over and laws and regulations governing the subsoil and seabed

of the Outer Continental Shelf and all artificial islands and fixed structures erected thereon.

Subsection (a) provided that:

> (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: Provided, however, that mineral leases on the Outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.
>
> (2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the Outer Continental Shelf.
>
> (3) The provisions of this section for adoption of State law as the law of the United States shall

never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the Outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

STATEMENT OF THE CASE

This is an oil company (Respondent Mobil)/drilling contractor (Petitioner Gulf Offshore) contractual indemnity case arising in the area governed by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1982). Respondent's action for contractual indemnity against Petitioner was brought as a third party action in a suit by a personal injury plaintiff, Gaedecke, against Respondent, which action also arose in the area governed by the Lands Act.

On July 9, 1974, Petitioner and Respondent entered into Contract No. 1159, which concerned oil well completion operations to be performed by Petitioner on Respondent's platform wells situated in Grand Isle Block 95 offshore of the State of Louisiana on the Outer Continental Shelf.

In September of 1975, Hurricane Eloise crossed the Yucatan Peninsula in the Gulf of Mexico and regained strength, necessitating evacuation of offshore oil platforms in the Gulf, including the platform upon which Petitioner was performing its completion work for Respondent.

Personal injury plaintiff Gaedecke was injured on September 22, 1975, following his evacuation from the platform to a work boat.

Plaintiff Gaedecke sued Respondent and three additional companies associated with the work boat, L. A.

Levy, Inc., Arthur Levy Boat Service, Inc. and Offshore Crews, Inc. for personal injuries sustained as a result of the accident. Respondent filed a Third Party Complaint against Petitioner, alleging liability for indemnity on both tort and contract theories.

Prior to trial, Plaintiff Gaedecke settled with Respondent and the Levy defendants, which had assumed Respondent's defense. Plaintiff proceeded solely against Respondent which, in turn, sought *contractual* indemnity from Petitioner.

Trial was to a jury, which found that Respondent Mobil, by its negligence as offshore platform owner, proximately caused the injuries to Plaintiff. Damages of $900,000.00 were found. The jury also found that Plaintiff's injuries were incident to or resulted directly or indirectly from the work of Petitioner under its contract with Respondent. Judgment for $900,000.00 was rendered in favor of Plaintiff against Respondent, out of which the Intervenor was awarded recovery of the sum of $32,712.09, its workers' compensation lien. Judgment for contractual indemnity in the amount of $900,000.00 was rendered against Petitioner.

Petitioner raised the federal question regarding appropriate instruction to the jury on the issue of taxation of any damage award by requesting that an instruction be given to the jury on the issue. Instruction C was requested in a timely and appropriate fashion prior to finalization of the jury charge but was refused by the Trial Court. (Tr. 198-199, 200-204) and printed in Appendix B, *infra*, p. B-1. Denial of the requested instruction was set forth as a reason for granting a new trial in Petitioner's Amended Motion for New Trial (Tr. 281), but such

Motion was overruled. The point was preserved in the appeal to the Court of Civil Appeals as Point of Error 13. The Court of Civil Appeals affirmed the Trial Court on the point. The issue was carried forward as the Twelfth Point of Error in Petitioner's Application for Writ of Error to the Supreme Court of Texas, but the Application was denied.

This Court granted Gulf Offshore's Petition for Writ of Certiorari, affirmed the lower courts in regard to the issue of subject matter jurisdiction, but vacated the Court of Civil Appeals' holding with respect to the tax instruction issue and remanded the case for further consideration.

The point of error was rebriefed and argued before the Court of Appeals on remand. The decision of the Trial Court was again affirmed. The issue was carried back to the Supreme Court of Texas, which again denied Petitioner's Application for Writ of Error.

REASONS FOR GRANTING THE WRIT

The significance of the question presented for review by this Petition has been established by this Court's granting of Gulf Offshore's first Petition for Writ of Certiorari raising precisely the same issue for resolution. A Writ of Certiorari was granted in Cause No. 80-590 by this Court on December 8, 1980. The case was argued March 31, 1981, and decided July 1, 1981. *Gulf Offshore Company, A Division of the Pool Company v. Mobil Oil Corporation*, 453 U.S. 473 (1981).

The important question of federal law which has not been, but must be settled by this Court, "whether *Liepelt* displaces the state rule in an OCSLA case," 453 U.S. at 488, was deferred by this Court pending a decision by

the Texas Court of Appeals on remand as to whether Louisiana law would *not* require that a tax instruction be given upon timely request, creating a clear conflict with the federal common law rule generally applicable to federal damages actions articulated in *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490 (1980).

This obviously vital issue involving construction of a federal statute, the Lands Act, and application of federal law is brought squarely before this Court by this second Petition, necessitated by the holding of the Texas Court of Appeals on remand, which is in clear conflict with decisions of both this Court and the United States Court of Appeals for the Fifth Circuit. A definitive resolution of this important question of federal law can no longer be avoided in view of the Texas Court of Appeals' holding on remand that Louisiana law does not *require* the tax instruction, which is obviously inconsistent with the federal rule established in *Liepelt*.[3] This Court indicated in *Gulf Offshore*, this case, that the central question with respect to resolution of the issue presented for review need be answered only if Louisiana law was found to be inconsistent with federal law. As indicated, such a finding has now been made and the more significant question, "whether *Liepelt* displaces the state rule in an OCSLA case," is ripe for decision.

In summary, the compelling reasons why a review on Writ of Certiorari should be granted in this case are:

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3. A decision on the question presented for review can be avoided only if this Court reviews the Texas Court of Appeals' decision regarding Louisiana law on the tax instruction issue and reverses it. Petitioner believes that the decision below on this point is gravely in error and that this Court should seriously consider deciding the question in connection with this Petition or certifying it to the Louisiana Supreme Court for an authoritative decision.

1.) The issue presented for review concerns an extremely important question of construction of a federal statute and application of federal law.

2.) The decision of the Texas Court of Appeals on remand is in direct conflict with the express language of the statute and decisions of both the Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit interpreting it.

THE HOLDING OF THE TEXAS COURT OF APPEALS ON REMAND

As indicated, this cause was returned before the Texas Court of Appeals on remand, that court being asked to determine:

1.) Whether Louisiana law requires an instruction to the jury that damage awards are not subject to federal income taxation and, if it does not,

2.) Whether the federal common law rule requiring such an instruction articulated in *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490 (1980) displaces the state rule in an Outer Continental Shelf Lands Act case such as this one.

Addressing these questions, the Court of Appeals held that:

1.) Louisiana law makes the giving of an explanatory instruction concerning income taxation discretionary with the trial court and,

2.) Although the incorporation of state law does not *preclude* a court from finding that state law is in-

> consistent with a federal common law rule generally applicable to federal damages actions, the *Liepelt* federal common law rule is not "applicable federal law" in this case because the Lands Act borrowed the Louisiana state law remedy for personal injury, including the Louisiana discretionary rule on instructing the jury regarding taxation of an award, and this borrowed state law is the federal law applicable in this case.

The holding that borrowed state law, not existing federal law, is applicable federal law in this cause is in conflict with decisions of both this Court and the Fifth Circuit Court of Appeals because it represents an incorrect interpretation of the express language of the statute. Under the Lands Act, borrowed state law can apply *only if* it is not inconsistent with existing federal law. The view that state law becomes federal law so that the state law *qua* federal law ousts federal law is simply incorrect. The statutory language is clear that the existence of federal law on a point precludes resort to state law, whether it be inconsistent or not.

CONFLICT WITH THE UNITED STATES SUPREME COURT

On two occasions, at the time of the initial appeal and on remand from this Court, the Texas Court of Appeals has held that the Trial Court committed no error in denying Petitioner's requested jury Instruction C, designed to make the jury aware that any award of damages would not be subject to federal income taxation. This is in direct conflict with this Court's holding in *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490

(1980). In *Liepelt*, this Court held that it was reversible error for the Trial Court to refuse a requested jury instruction that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." In this case, Petitioner requested a similar, brief and easily understood instruction, which was refused.[4]

In *Gulf Offshore*, this case, this Court indicated that, although there was some "doubt", it would seem that if Louisiana law on the tax instruction issue is "inconsistent" with federal law as expressed in *Liepelt*, *Liepelt* controls. As will be discussed, in view of the Court of Appeals' holding that Louisiana law is "inconsistent" with federal law, *Liepelt* does control and the decision of the Court of Appeals is in error. The "doubt" expressed by this Court dissolves when the plain language of the statute, supported by its legislative history, is accorded proper deference.

The Court of Appeals evidently conceded that *Liepelt* expressed a federal common law rule generally applicable to federal damages actions, but held that the "Louisiana law which makes discretionary the giving of a jury instruction that damage awards are not subject to income taxation" became surrogate federal law in this case due to the Lands Act's borrowing of adjacent state law so

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4. Petitioner's requested Instruction C was as follows:
You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes (Tr. 199), and printed in Appendix B, *infra*, p. B-1.

that the *Liepelt* rule was not "applicable." This analytical approach is incorrect because the Lands Act mandates an initial inquiry as to whether federal law on the particular point at issue exists. Where an affirmative answer is indicated, resort to "borrowing" of state law is not authorized. Under the Lands Act, existing federal law is "applicable" in the first instance so that state law, whether or not inconsistent, is not utilized. Stated simply, if there is no "gap" in the federal law, it is not necessary to "borrow" state law.

The language of the statute clearly provides that federal law is applicable in the Lands Act area and that state law is adopted as surrogate federal law only to fill "gaps" in the federal law. 43 U.S.C.A. § 1333, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969).

The legislative history of the Lands Act establishes that it was the intention of Congress that adopted state law *supplement*, rather than displace, federal law. Thus, if, as in this case, federal law on a particular point exists, it is controlling and state law, whether or not "inconsistent," will not apply. In other words, there being no "gap" in the federal law on the question of the appropriateness of a cautionary jury instruction, there is no need to look to the law of the adjacent state.

The Report of the Committee on Interior and Insular Affairs with respect to Senate Bill 1901 reflects the congressional intent that existing federal law be applied in the first instance. The Senate bill is essentially what became the Lands Act and the Committee Report with respect to it is, therefore, pertinent. With respect to the purpose of the bill and the law made applicable to the outer Continental Shelf, the Report indicates as follows:

> To carry out the primary purposes of the measure, a body of law is extended to the outer shelf area, consisting of:
>
> (a) The constitution and the laws, and the civil and political jurisdiction, of the Federal Government;
>
> (b) The regulations, rules, and operating orders of the Secretary of the Interior; and
>
> (c) in the *absence* of such applicable Federal law or adequate Secretarial regulation, the civil and criminal laws of the State adjacent to the outer shelf area. Such State laws are adopted as Federal law for the area of the shelf that would be within the boundaries of the State if such boundaries were extended seaward to the outer margin of the outer shelf. (Emphasis supplied)

S. Rep. No. 411, 83d Cong., 1st Sess. 2 (1953).

Apparently, the "doubt" voiced by this Court stems from the decision in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), relied upon by the Court of Appeals to support its decision, in which it was held that Louisiana law rather than federal common law provided the federal statute of limitations for personal injury damages actions under the Lands Act.

Upon a careful analysis of the holding in *Huson*, however, it is clear that the opinion is inapposite with respect to applying existing general federal common law as opposed to inconsistent state law. In *Huson*, this Court simply rejected the Fifth Circuit Court of Appeals' attempt to apply the *admiralty* doctrine of laches to an outer Continental Shelf case in the face of the holding in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969) that admiralty law remedies were not made

applicable by the Lands Act. The holding in *Huson* resulted from clear congressional intent that admiralty doctrines should not apply under the Lands Act. 404 U.S. at 104. This Court recognized that the application of Louisiana's statute of limitations was "subject to the absence of 'inconsistent' and applicable federal law." 404 U.S. at 103. Had there been in existence a federal statutory limitations period or, alternatively, had a general federal common law of laches apart from the limited *admiralty* doctrine of laches existed, the inconsistent Louisiana state law would have yielded to the applicable federal law. In *Huson*, the initial inquiry was whether applicable federal law existed on the issue of limitations. The inapplicability of the admiralty laches doctrine and the absence of other pertinent federal law cleared the way for borrowed state law to apply on the point.

This case differs from *Huson* because Petitioner has not sought creation of federal common law to apply in the place of inconsistent state law. Rather, Petitioner has solicited recognition that federal law on the question of a cautionary jury instruction regarding taxation of damage awards already exists and, under the express language of the Lands Act, must be applied. In *Gulf Offshore*, this case, it was recognized that *Liepelt* articulated a federal common law rule generally applicable in federal law damages actions. Petitioner perceives no cogent reason why this rule would not be "applicable" in Lands Act cases.

The desire of this Court to more carefully explore the interaction between federal law and borrowed state law under the Lands Act and the holding of the Court of Appeals that "borrowed" state law is the "applicable"

federal law, as opposed to *Liepelt*, is understandable in view of this Court's discussion in *Huson* regarding the incorporation of a "body" of state law and the Court's discussion in *Rodrigue* and *Huson* of Congress' concern for the application of law familiar to workers from the adjacent states. Although both aspects of the passage of the Lands Act are of interest, they are not controlling with respect to the applicability of state law in the face of existing federal law on the point in question because the express statutory language mandates use of existing federal law. It cannot be disputed that State law is to be borrowed only if existing federal law fails to address the issue in question.

In *Rodrigue*, this Court discussed the compromise in Congress which resulted in the present structure of the Lands Act and mentioned the "special relationship" between shelf workers and the adjacent shore which had an impact upon the final wording of the Act. Nevertheless, the Court made it clear that the Lands Act calls for application of existing federal law while supplementing gaps in that law with state law through the adoption of state law as the law of the United States. Prefacing a review of a portion of the congressional debate with respect to this aspect of passage of the Lands Act, the Court observed that:

> The principles that federal law should prevail, and that state law should be applied only as federal law and then only when no inconsistent federal law applied, were adopted by a Congress in which full debate had underscored the issue. 395 U.S. at 358.

In *Rodrigue*, state law applied only because the existing federal law, the Death on the High Seas Act, was found

inapplicable as an admiralty remedy expressly rejected by Congress in passing the Lands Act. The initial inquiry was whether existing federal law addressed the problem and was applicable.

Although the opinion in *Huson* discusses the adoption of a "body" of state law as federal law, the Court made it clear that the application of state law is subject to the absence of inconsistent and applicable federal law. As indicated above, it was only the absence of a generally applicable federal rule regarding limitations that permitted application of the Louisiana limitations period in that case.

In summary, proper respect for the clear language and structure of the Lands Act provision regarding the law to be utilized requires application in this case of federal law as enunciated in *Liepelt*. The *Liepelt* rule is generally applicable federal law which suffers no disqualification insofar as applicability on the outer Continental Shelf is concerned.

CONFLICT WITH THE FIFTH CIRCUIT COURT OF APPEALS

The principle that existing federal law is controlling, prohibiting reference to borrowed state law, is best illustrated by examination of authorities relating to other points of federal law. For example, in *Berry v. Sladco, Inc.*, 495 F.2d 523 (5th Cir. 1974), the issue was whether interest should accrue from the time of judicial demand, as provided under Louisiana law, as opposed to from the time of judgment, as provided by federal law. The Fifth Circuit Court of Appeals held that where federal law exists on a point, such as the proper interest

period (or the giving of a cautionary jury instruction), such is controlling in an action brought under the Lands Act. The court specifically referred to this Court's decision in *Rodrigue* for this holding.

Also illustrative is the decision in *Continental Oil Company v. The London Steam-Ship Owners' Mutual Insurance Association, Ltd.*, 417 F.2d 1030 (5th Cir. 1969). In *Continental Oil*, the Fifth Circuit considered interaction between the Lands Act, maritime law and the Louisiana direct action statute. In the context of an ocean-going vessel having come into collision with a fixed off-shore drilling platform, the Fifth Circuit held that maritime law supplied a fully effective right and remedy and was applicable and controlling in opposition to the Louisiana direct action statute, which was part of the "borrowed" state law of the adjacent state under the Lands Act. The court discussed the "recurring theme of *Rodrigue*", that the question of the existence of federal law in the precise situation must be answered in the negative before the law of the adjacent state can be "borrowed."

From the language of the statute itself, from the legislative history of the Lands Act, and from the court opinions interpreting the Lands Act, it must be recognized that the law applicable to cases arising in the area governed by the Act is *federal* law, that existing federal law is to be applied in the first instance, and, finally, that state law *qua* federal law is utilized only when there is a gap in the existing federal law. On the basis of this analysis, it is clear that because federal law with respect to cautionary jury instructions regarding taxation of damage awards exists, in the form of *Liepelt*, inconsistent state law is not applicable or controlling. In fact, because

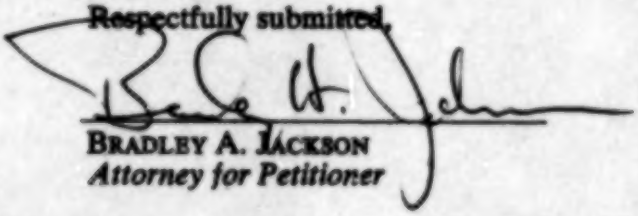
federal law on the point already exists, the statute prohibits the utilization of state law.

Because applicable and controlling federal law requires that the jury be instructed that any damage award will not be subject to income taxation and because the Trial Court refused to so instruct the jury upon timely request by Petitioner, this Petition should be granted and this case reversed and remanded for a new trial.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,



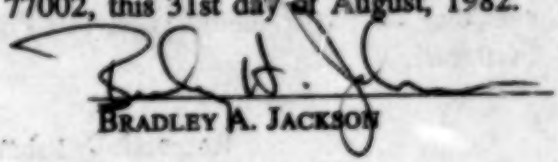
BRADLEY A. JACKSON
Attorney for Petitioner

Of Counsel:

CHARLES D. KENNEDY
ROYSTON, RAYZOR, VICKERY & WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari have been served on all parties required to be served, i.e., on Respondent by placing same in an envelope and depositing it in the United States Mail, with first-class postage prepaid, addressed to counsel of record as follows: Frank Caton, Esq., Crain, Caton, James & Womble, 3300 Two Houston Center, Houston, Texas 77010, and on the Plaintiff in the Trial Court by placing same in an envelope and depositing it in the United States Mail, with first-class postage prepaid, addressed to counsel of record as follows: Joseph D. Jamail, Esq., Jamail, Kolius & Mithoff, 3300 One Allen Center, Houston, Texas 77002, this 31st day of August, 1982.



BRADLEY A. JACKSON

APPENDIX A

OPINIONS AND JUDGMENTS BELOW

Court of Appeals Opinion on Remand

No. B2159

Affirmed, and Opinion filed January 28, 1982.

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY, Appellant

v.

MOBIL OIL CORPORATION, Appellee

Appeal from 129th District Court of Harris County

This cause returns before this court on remand from the Supreme Court of the United States. *Gulf Offshore Co. v. Mobil Oil Corp.*, 101 S.Ct. 2870 (1981). Plaintiff Steven Gaedecke, an employee of Gulf Offshore Co., brought suit in a state court in Texas against Mobil Oil Corp. and others for damages for personal injuries sustained while he and other workers on a Mobil drilling platform offshore from Louisiana were being evacuated from the platform because of an approaching hurricane. The drilling platform was located above the sea bed of the Outer Continental Shelf. Mobil filed a third party complaint against Gulf Offshore Co. for indemnity under both tort and contract theories. Trial to a jury resulted in a judgment for Gaedecke against Mobil and, on the indemnity claim, for Mobil against Gulf Offshore.

On appeal to this court the trial court judgment was affirmed. *Gulf Offshore Co. v. Mobil Oil Corp.*, 594 S.W. 2d 496 (Tex. Civ. App.—Houston [14th] 1979). After the Texas Supreme Court refused writ of error, n.r.e., the Supreme Court of the United States granted certiorari and in a decision handed down on July 1, 1981, affirmed this court's holding that the Outer Continental Shelf Lands Act did not vest exclusive jurisdiction of this case in the federal courts and that the district court of Harris County, Texas, had subject matter jurisdiction, but vacated this court's holding that it was not error for the trial court to refuse to instruct the jury that its award was not subject to income taxes. The U. S. Supreme Court remanded the case to this court for a determination of whether Louisiana law requires such an instruction, and, if it does not, whether the United States Supreme Court's decision in *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980), displaces the State rule in an OCSLA case. Finally, the Supreme Court stated in its opinion that if this court holds the trial court erred in refusing the requested instruction we may then address the argument of Gaedecke and Mobil that Gulf Offshore was not prejudiced by the error.

1. Does Louisiana law require a jury instruction that damage awards are not subject to income taxation?

Cases bearing on this question have been submitted to Louisiana appellate courts on three occasions. On each occasion the appeal was to the Court of Appeals of Louisiana, Fourth Circuit, and involved land-based, common law negligence actions. It seems clear from a reading of the opinions that Louisiana law makes the giving of

an explanatory instruction concerning income taxation discretionary with the trial court.

Gulf Offshore relies principally on the case of *Debose v. Trapani*, 295 So.2d 72 (La. App. 4th Cir. 1974), *writ denied*, 299 So.2d 359 (La. 1974), in support of its contention that the instruction is mandatory. Nowhere in its opinion does the court imply that the instruction is mandatory. The court simply rejected the argument that it was error to give the instruction.

Ten years before the *Debose* decision a different panel of the same Louisiana appellate court found no error in the trial court's refusal to give such an instruction and noted that the court had properly instructed the jury as to the compensatory nature of damages and had specifically listed nine elements of damages which the jury might consider in arriving at its award. *Guerra v. W. J. Young Construction Co.*, 165 So.2d 882 (La. App. 4th Cir. 1964), *writ ref'd*, 167 So.2d 676 (La. 1964). The trial judge gave a similar instruction in the instant case.

In the third case, *Francis v. Government Employees Insurance Co.*, 376 So.2d 609 (La. App. 4th Cir. 1979) *writ denied*, 378 So.2d 1391 (La. 1980), the court simply stated that the requested instruction was authorized by *DeBose* and held that the trial court had not erred in giving it.

It is clear that *Guerra* is the only case in which the Louisiana Appellate Court was presented with the precise question involved here. In the absence of contrary authority we are of the opinion that *Guerra* constitutes Louisiana law to the effect that such a jury instruction is not mandatory. Under the Louisiana law the Texas trial court did not err in refusing to give the instruction.

2. Does *Liepelt* displace the Louisiana rule in this OCSLA case?

In *Norfolk & Western Railway Co. v. Liepelt,* 444 U.S. 490, the United States Supreme Court held that a defendant in an FELA death case is entitled to an instruction that damage awards are not subject to federal income taxation and that the Illinois trial court had erred in refusing the requested instruction. The case was reversed and remanded to the Illinois state court.

Gulf Offshore contends that *Liepelt* controls our decision on this question in the instant case.

The OCSLA mandates that the laws of the adjacent state apply as surrogate federal law "(t)o the extent that they are applicable and not inconsistent with this Act or with other Federal laws." 43 U.S.C. § 1333(a)(2).

To help explain the question we have been requested to answer, we quote from the majority opinion of the United States Supreme Court in the instant case as follows:

> If Congress had been silent about the source of federal law in an OCSLA personal injury case, *Liepelt* would require that the instruction be given.
>
> But Congress was not silent. It incorporated for this case the applicable law of Louisiana, but only "[t]o the extent [it is] not inconsistent" with federal law. The statute does not distinguish between federal statutory and judge-made law. It would seem then that if Louisiana law is "inconsistent", *Liepelt* controls. Doubt arises, however, because in OCSLA Congress borrowed a remedy provided by state law and thereby "specifically rejected national uniformity" as a paramount goal. *Chevron Oil v. Huson,* 404 U.S. 97, 104 (1972). In *Chevron,* we held that

> Louisiana rather than federal common law provided the federal statute of limitations for personal injury damages actions under OCSLA. We recognized that "Congress made clear provision for filling the 'gaps' in federal law; it did not intend that federal courts fill those 'gaps' themselves by creating new federal common law." *Id.*, at 104-105, 92 S.Ct. at 354. In this case, we face an analogous question: does the incorporation of state law preclude a court from finding that state law is "inconsistent" with a federal common law rule generally applicable to federal damages actions?

101 S.Ct. at 2880.

Our study of the OCSLA and the United States Supreme Court's decisions in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and the instant case leads us to the conclusion that the incorporation of state law does not *preclude* a court from finding that state law is inconsistent with a federal common rule generally applicable to federal damages actions. However, we are of the opinion that such a federal common law rule is not "applicable federal law" in this case, a suit for damages for personal injuries which is governed by Louisiana state law applied as federal law under the OCSLA. We are mindful that in OCSLA the Congress of the United States adopted state laws only to the extent that they are not inconsistent with federal laws; however, it was recognized by the Supreme Court in *Huson* that unless a federal law is *applicable* to the particular case, the state law is not inconsistent with it. In the instant case OCSLA has borrowed a remedy provided by the state law of Louisiana: a cause of action for damages for personal injuries. We think that when OCSLA borrowed the remedy, it

borrowed the remedy in its entirety. In other words, OCSLA made the entire state cause of action *applicable* federal law, enforceable as federal law. This conclusion leads to our holding that OCSLA has borrowed from the law of Louisiana and has made applicable federal law in this case the Louisiana law which makes discretionary the giving of a jury instruction that damage awards are not subject to income taxation. It follows that if the Louisiana law concerning the requested instruction has become surrogate federal law applicable in this case, then the *Liepelt* rule is not *applicable* federal law and hence the surrogate federal law is not inconsistent with the rule announced in *Liepelt*.

We are of the opinion that our decision on this point is not in conflict with the Supreme Court's opinion in the instant case. If the Supreme Court had not intended to leave open the possibility of this very decision, it would have not expressed doubt about the application of the *Liepelt* rule and would have decided the question itself and not remanded to this court for determination.

Also, our decision on this question is in harmony with the opinion of the Supreme Court of the United States in *Huson*. In that case the court recognized that a "comprehensive body of federal law" was not necessarily applicable under OCSLA. 404 U.S. at 101. Holding that the Louisiana statute of limitations applied as federal surrogate law, the Supreme Court noted in *Huson* that a cause of action for personal injuries must be governed by the law of the adjacent state of Louisiana, applied as federal law, including the state statute of limitations. Then the court said in *Huson*:

> The policies underlying the federal absorption of state law in the Lands Act makes this result particularly obvious. As we pointed out in *Rodrigue*, Congress recognized that "the Federal Code was never designed to be a complete body of law in and of itself" and thus that a comprehensive body of State law was needed. *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. at 358, 361.

404 U.S. at 103.

Our decision also comports with Congress' recognition as pointed out in both *Rodrigue* and *Huson* that special relationships between the men working on these artificial islands and the adjacent shore to which they commute favors application of state law with which these men and their attorneys are familiar.

Also as stated by the court in *Huson*, "If Congress' goal was to provide a comprehensive and familiar body of law, it would defeat that goal to apply only certain aspects of a state personal injury remedy in federal court." 404 U.S. at 103. This statement applies to the question here presented with just as much, if not more, force than to the question presented in *Huson*.

It seems important to this court that the United States Supreme Court in the instant case saw fit to restate with approval its earlier statement in *Huson* to the effect that in OCSLA Congress borrowed a remedy provided by state law and thereby "specifically rejected national uniformity" as a paramount goal. 101 S.Ct. at 2880.

For the reasons set forth above we hold that the rule announced in *Liepelt* does not displace the state rule in an OCSLA case.

We have thus decided the questions mandated by the Supreme Court of the United States in this case and we affirm the judgment of the trial court.

/s/ William E. Junell
Associate Justice

Judgment rendered, and Opinion filed January 28, 1982.

Panel consists of Chief Justice J. Curtiss Brown and Associate Justices Junell and Price.

Court of Appeals

JUDGMENT ON REMAND

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY
VS. NO. B2159
MOBIL OIL CORPORATION, ET AL

"This cause, an appeal from the judgment signed December 18, 1978, came on to be heard on the transcript of the record on remand from the Supreme Court of the United States. We have inspected the record and decided the questions mandated by the Supreme Court of the United States and find no error in the judgment of the trial court.

We order Gulf Offshore Co. and its Surety, Western Surety Co., to pay all costs incurred by reason of this appeal.

This decision is ordered certified below for observance."

COURT OF APPEALS
14th Supreme Judicial District
CIVIL COURTS BUILDING
Houston, Texas 77002

February 25, 1982

Hon. Charles D. Kennedy
Hon. Bradley A. Jackson
Royston, Rayzor, Vickery & Williams
One Shell Plaza, Suite 3710
Houston, Texas 77002

Hon. Frank Caton
Hon. Gary L. Marks
Crain, Caton, James & Oberwetter
3300 Two Houston Center
Houston, Texas 77002

Hon. Joseph D. Jamil
Hon. Gus Kolius
Hon. John B. Neibel
Hon. Nat B. King
Jamail & Kolius
3300 One Allen Center
Smith at Dallas Streets
Houston, Texas 77002

Re: B2159—Gulf Offshore Company, A Division of the Pool Company vs. Mobil Oil Corporation, et al, from Harris

Gentlemen:

Please be advised that on this date in the above cause the Court OVERRULED appellant's motion for rehearing.

Please be advised that application for writ of error, if any, must be submitted on or before Monday, March 29, 1982.

Respectfully,

/s/ CLAUDINE PARTEN
Claudine Parten, Clerk

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

May 5, 1982

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of

GULF OFFSHORE COMPANY,
DIVISION OF POOL COMPANY

vs.

MOBIL OIL CORPORATION ET AL.

was this day refused. No reversible error. (Motion to dismiss overruled).

Very truly yours,

C-1169

GARSON R. JACKSON, Clerk

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

June 2, 1982

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of GULF OFFSHORE CO. v. MOBIL OIL CORPN. ET AL., No. C-1169
was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

JUDGMENT ENTERED: Volume 1655, Page 767, General Minutes District Courts, in and for Harris County, Texas.

NO. 1,052,262

In The
DISTRICT COURT OF HARRIS COUNTY, TEXAS
129th Judicial District

STEVEN GAEDECKE

v.

MOBIL OIL CORPORATION, ET AL

v.

GULF OFFSHORE CO.,
A DIVISION OF THE POOL COMPANY

JUDGMENT

BE IT REMEMBERED that on the 20th day of November, 1978, came on to be heard the above styled and numbered cause, wherein Steven Gaedecke is Plaintiff, Mobil Oil Corporation, Arthur Levy Boat Company, Arthur Levy, Inc., and Offshore Crews, Inc. are Defendants, and Mobil Oil Corporation is Third-Party Plaintiff, and Gulf Offshore Co., A Division of the Pool Company is Third-Party Defendant, and Employers' National Insurance Company is Intervenor, and came the parties Plaintiff, Defendants, Third-Party Plaintiff, Third-Party Defendant and Intervenor, and announced ready for trial. Prior to the voir dire examination of the jury panel, Plaintiff, in open court, took a voluntary non-suit as to Defendants Arthur Levy Boat Company, Arthur Levy, Inc.,

and Offshore Crews, Inc., and the Court having noted said Non-Suit did by its Order dismiss the Defendants Arthur Levy Boat Company, Arthur Levy, Inc., and Offshore Crews, Inc. only. And came the jury consisting of twelve good and lawful men and women consisting of Catherine Mary Byrnes and eleven others who being duly empaneled and sworn and having heard the pleadings, evidence, stipulations and arguments of counsel, did on the 22nd day of November, 1978, return in open court their verdict as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that Mobil Oil Corporation, at the time in question and under the circumstances existing, failed to exercise that degree of care that should have been exercised by a reasonably prudent offshore platform operator in one or both of the following:

1. In waiting until approximately 9:00 a.m. on September 22, 1975, to evacuate the platform in question?

   To which the jury answered "yes".

2. In the selecting of the method used to evacuate Steven Gaedecke's crew from the platform?

   To which the jury answered "yes".

If you have answered "yes" to either parts of Special Issue No. 1, and only in that event, then answer

SPECIAL ISSUE NO. 2

Was such a proximate cause of the injuries suffered by Steven Gaedecke?

To which the jury answered "yes".

SPECIAL ISSUE NO. 3

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Steven Gaedecke as a direct and natural result of the injuries he received in the incident in question.

You will consider the following elements of damage, if any, and none other:

(a) Loss of earnings which he has sustained in the past;

(b) Loss of earning capacity which in reasonable probability he will sustain in the future;

(c) Physical pain and mental anguish which he has suffered in the past;

(d) Physical pain and mental anguish which in reasonable probability he will suffer in the future;

(e) Physical impairment he has sustained in the past;

(f) Physical impairment which in reasonable probability he will sustain in the future.

Answer in dollars and cents, if any.

To which the jury answered "$900,000.00".

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that Steven Gaedecke's injuries were incident to, or resulted directly or indirectly from the work to be performed by Gulf Offshore Company under its contract with Mobil?

To which the jury answered "yes".

Catherine Mary Byrnes

Verdict of the jury was received by the Court and filed and entered of record on the minutes of the Court, and the Court having considered the pleadings on file herein, the verdict of the jury, the stipulations of the parties and the proof adduced, and having considered Plaintiff's Motion for Judgment, the Court is of the opinion that Plaintiff is entitled to have and recover of and from the Defendant Mobil Oil Corporation the sum of $900,000.00, together with interest thereon at the rate of 9% per annum from the date of entry of the Judgment until paid;

The Court is further of the opinion that out of such amount recovered by the Plaintiff against Defendant Mobil Oil Corporation, the Intervenor Employers' National Insurance Company should have and recover the sum of $32,712.09;

The Court is further of the opinion that Plaintiff should have and take nothing of and from the Defendants, Arthur Levy Boat Company, Arthur Levy, Inc. and Offshore Crews, Inc.;

The Court is further of the opinion that Third-Party Plaintiff Mobil Oil Corporation is entitled to and is granted indemnity of and from Third-Party Defendant Gulf Offshore Co., A Division of the Pool Company for all sums, including interest and costs of court, that the Defendant Mobil Oil Corporation is required to pay to Plaintiff by the terms of this Judgment;

The Court having further heard arguments and having read the briefs is of the opinion that the Law of Louisiana does apply and hereby applies such law in this action;

It is therefore,

ORDERED, ADJUDGED and DECREED by the Court that Plaintiff Steven Gaedecke do have and recover

of and from the Defendant Mobil Oil Corporation the sum of $900,000.00, together with interest thereon at the rate of 9% per annum from the date of the entry of Judgment until paid;

ORDERED, ADJUDGED and DECREED by the Court that out of such amount recovered by the Plaintiff against Defendant Mobil Oil Corporation, the Intervenor Employers' National Insurance Company do have and recover the sum of $32,712.09;

ORDERED, ADJUDGED and DECREED by the Court that Plaintiff has and takes nothing of and from the Defendants, Arthur Levy Boat Company, Arthur Levy, Inc. and Offshore Crews, Inc.;

ORDERED, ADJUDGED and DECREED by the Court that Third-Party Plaintiff Mobil Oil Corporation is hereby granted indemnity of and from Third-Party Defendant Gulf Offshore Co., A Division of the Pool Company for all sums, including interest and costs of court, that the Defendant Mobil Oil Corporation is required to pay by the terms of this Judgment;

ORDERED, ADJUDGED and DECREED that all costs of court accrued herein be and are taxed against the Defendant Mobil Oil Corporation for which execution may issue with same if not timely paid.

All relief not granted herein is denied.

SIGNED, RENDERED and ENTERED this 18th day of December, 1978.

/s/ THOMAS J. STOVALL, JR.
Judge Presiding

APPROVED AS TO FORM ONLY:

JAMAIL AND KOLIUS

_____

Attorneys for Plaintiff

FULBRIGHT AND JAWORSKI

_____

Attorneys for Intervenor,
Employers' National Insurance Company

CRAIN, CATON, JAMES & OBERWETTER

_____

Attorneys for Defendant-Third-Party
Plaintiff, Mobil Oil Corporation

ROYSTON, RAYZOR, VICKERY & WILLIAMS

_____

Attorneys for Third-Party Defendant,
Gulf Offshore Company, a Division of
the Pool Company

BAKER & BOTTS

_____

Attorneys for Defendants, Arthur
Levy Boat Company, Arthur Levy, Inc.
and Offshore Crews, Inc.

Court of Civil Appeals First Opinion

No. B2159

Affirmed, and Opinion filed December 12, 1979.

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Appellant

v.

MOBIL OIL CORPORATION,
Appellee

Appeal from 129th District Court of Harris County

Appellant, Gulf Offshore Company, a Division of the Pool Company, appealed from a judgment for indemnity rendered in favor of appellee, Mobil Oil Corporation. Appellant Gulf Offshore was a third party defendant below and appellee Mobil was defendant and third party plaintiff. Steven Gaedecke was plaintiff in the trial court.

Steven Gaedecke, an employee of third party defendant-appellant Gulf Offshore, sued defendant-appellee Mobil, and L. A. Levy, Inc., Arthur Levy Boat Service, Inc. and Offshore Crews, Inc., for personal injuries sustained on a vessel owned by Levy and chartered by Mobil. Mobil later filed a third party complaint against Gulf Offshore, alleging liability for indemnity pursuant to certain provisions in the contract for well completion operations which was executed by Gulf Offshore as the contractor-indemnitor and Mobil as platform owner-indemnitee.

Prior to trial, plaintiff Gaedecke settled with the Levy defendants for a guaranteed recovery of $100,000.00 and proceeded to take a non-suit against them. Plaintiff also reached agreement with defendant Mobil, that if Mobil did not obtain indemnity from Gulf, plaintiff's recovery against Mobil would be limited to $200,000.00 plus the compensation lien. Also present in the trial court was intervenor, Employers' National Insurance Company.

On September 22, 1975, plaintiff Gaedecke was safely aboard the vessel Salton-Seahorse, having been evacuated pursuant to the implementation of Mobil's hurricane evacuation plan. Defendant Mobil had arranged for the vessel, owned and operated by Levy, to stand by for the evacuation. Following preparation for evacuation, all machinery was shut down, and after evacuation from the platform of all but two platform workers employed by Gulf Offshore by use of the crane, even its generator was shut off. As the last two workers, the crane operator and his helper, attempted to evacuate from the platform using a rope to swing onto the deck of the Salton-Seahorse, plaintiff heard some party yell down to him to go aft and provide assistance. A large wave washed across the aft area of the vessel where he had positioned himself and plaintiff was swept along the deck of the vessel and ended up against a pallet loaded with sand. Plaintiff Gaedecke suffered injuries primarily to his back.

At trial in response to special issues, the jury returned a verdict which found that defendant, Mobil Oil Corporation, failed to exercise that degree of care that should have been exercised by a reasonably prudent offshore platform operator in waiting until approximately 9:00 a.m. on September 22, 1975, to evacuate the platform and in the selection of the method used to evacuate the

crew from the platform; that such were a proximate cause of the plaintiff's injuries; that $900,000.00 would be a sum which would fairly and reasonably compensate plaintiff for injuries suffered; and that plaintiff's injuries were incident to, or resulted directly or indirectly from, the work to be performed by Gulf Offshore under its contract with Mobil. The trial court entered judgment based on the jury's answers to the special issues and granted indemnity to Mobil from Gulf Offshore for $900,000.00 less the compensation lien of $32,712.09. Gulf Offshore appeals from the judgment of indemnity.

Defendant Mobil and third party defendant Gulf Offshore entered into contract number 1159, which concerned oil well completion operations to be performed by Gulf Offshore on defendant Mobil's platform wells situated in Grande Isle, Block 95, offshore of the State of Louisiana. Section 15 set out the provisions made concerning insurance and indemnity:

> 15. INSURANCE AND INDEMNITY:
>
> 15.1 At any and all times during the term of this agreement, Contractor agrees to maintain in force and submit evidence of insurance equal to or in excess of the requirements detailed in Exhibit B attached hereto and made a part hereof.
>
> 15.2 All insurance shall be carried in a company or companies acceptable to Mobil and shall be maintained in full force and effect during the term of this agreement, and shall not be canceled [sic], altered, or amended without ten (10) days prior written notice having first been furnished Mobil. Upon request Mobil shall be furnished certified copies of all such insurance policies.
>
> 15.3 In the event Contractor is a self-insurer and Mobil has consented to Contractor's being a self-

> insurer as to any one or more of the risks as to which coverage is required, evidence of such consent must be in writing and approved by a representative of Mobil authorized to enter into such consent agreement.
>
> 15.4 Contractor shall protect, indemnify and save Mobil Harmless against any and all claims, demands and causes of action of every kind and character arising in favor of any person, including both Mobil's and Contractor's employees, on account of personal injuries or death, or damage to property occurring, growing out of, incident to, or resulting directly or indirectly from, the work to be performed by Contractor hereunder, whether such loss, damage, injury or liability arises from or is contributed to by the negligence of Mobil or its employees, and whether due to imperfection of any material furnished by Mobil, or the premises themselves or any equipment thereon, whether latent or patent, or for any other cause whatsoever; and for damages for infringement of any patent as more particularly set forth in Paragraph 23 hereof.

Appellant's first point of error addresses the threshold question of the jurisdiction of the courts of the State of Texas to entertain causes of action filed pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1331-1356 (1979). There is no dispute as to the applicability of the Outer Continental Shelf Lands Act to this case. 43 U.S.C.A. § 1333(a)(1) (1975), in effect at the time of this accident, states that:

> The Constitution and laws of civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached

> to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state.

The section of the Act in effect in this case, 43 U.S. C.A. § 1333(b) (1975), governing jurisdiction specifies that:

> The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose.

We note that nowhere in this section does the word "exclusive" appear. Appellant argues that the Act vests exclusive jurisdiction of the subject matter of the plaintiff's main cause of action and the indemnity action in federal district court. We do not read 43 U.S.C.A. § 1333 (b) (1975) so as to oust our state courts of subject matter jurisdiction in this case.

No authoritative case law, either state or federal, has resolved the issue of the exclusivity of federal court jurisdiction over actions filed pursuant to the Outer Continental Shelf Lands Act. In *Fluor Ocean Services, Inc. v.*

Rucker Company, 341 F.Supp. 757 (E.D. La. 1972), and *Borne v. Tenneco Oil Company, et al.*, 1973 A.M.C. 388 (E.D. La. 1972), Judge Rubin held that the Act conferred exclusive jurisdiction on the U.S. district courts for causes of action arising out of operations conducted on the outer Continental Shelf and further held in *Fluor* that the intent of Congress was to make such operations subject to the exclusive control and jurisdiction of the federal government. We disagree for the reasons stated in the foregoing paragraph. We also note that in the penultimate paragraph of the opinion in *Fluor*, Judge Rubin merely found that the federal district court had original jurisdiction.

Judge Rubin wrote that as a matter of policy, ". . . in an area where the federal government had exerted exclusive sovereignty, such as the outer Continental Shelf, a single federal forum would be more appropriate than multiple state forums to decide disputes that arise there." *Fluor Ocean Services, Inc. v. Rucker Company, supra* at 760. We do not believe this to be necessarily so. The Act provides that the Constitution and laws of the United States govern the outer Continental Shelf, 43 U.S.C.A. § 1333(a)(1) (1975), and where applicable and not inconsistent with this Act or with federal laws, the laws of the adjacent state are declared to be the law of the United States regarding the outer Continental Shelf. 43 U.S.C.A. § 1333(a)(2) (1975). The end result would be an application of the same laws no matter where the forum was located, whether state or federal.

Following *Fluor* is the recent decision of *Friedrich v. Whittaker Corporation*, 467 F.Supp. 1012 (S.D. Tex. 1979). Here Judge Sterling recognized that the holding in *Fluor*, which acknowledged that such jurisdiction was

original, did not necessarily include exclusive. Judge Sterling dismissed the case in *Friedrich* on other grounds, noting that a prompt authoritative resolution of the issue of original or exclusive jurisdiction by a federal appellate court would be welcomed. *Friedrich v. Whittaker Corporation, supra* at 1015. Nonetheless, *Friedrich* held that federal courts have exclusive jurisdiction over claims arising out of accidents on fixed oil rigs in areas covered by the Outer Continental Shelf Lands Act. *Id.* at 1014.

One Louisiana decision, *Gravois v. Travelers Indemnity Company*, 173 So.2d 550 (La. Ct. App.), *writ ref'd*, 247 La. 1016, 175 So.2d 301 (1965), has also faced the issue of the exclusivity of federal court jurisdiction under the Outer Continental Shelf Lands Act. The majority opinion, holding for exclusive federal court jurisdiction under the Act, drew a vigorous dissent. We follow the dissent in *Gravois* in two respects by holding that our state courts may take cognizance of an action asserted under this Act irrespective of the fact that the incident giving rise thereto occurred within the federally defined limits of the outer Continental Shelf, and secondly, that our state courts have jurisdiction to adjudicate plaintiff's claims irrespective of which law must be applied in the determination thereof. *Gravois v. Travelers Indemnity Company*, 173 So.2d at 556, 559.

43 U.S.C.A. § 1333(b) (1975) of the Outer Continental Shelf Lands Act was amended and renumbered in 1978 to 43 U.S.C.A. § 1349(b)(1) (1978) and now reads in pertinent part as follows:

> . . . the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation

> conducted on the outer Continental Shelf or which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

The word "original" was omitted in the 1978 version. We find this omission significant in that it further supports our holding that the Act neither intended nor required sole original or exclusive jurisdiction in the federal courts. Point of error one is overruled.

In its second point on appeal, appellant Gulf Offshore contends that its Motion for Judgment Non Obstante Veredicto was improperly overruled because the jury verdict upon which the judgment of indemnity in favor of defendant Mobil was predicated, was the product of fraud and collusion by attorneys for plaintiff and Mobil, and Mobil, therefore, is precluded from obtaining indemnity as a matter of law. A motion for judgment non obstante veredicto is proper ". . . if a directed verdict would have been proper . . ." TEX. R. CIV. P. 301.

In determining whether the trial court erred in refusing to grant a motion for judgment notwithstanding the verdict, the inquiry is whether there is any evidence of probative force to support the verdict of the jury. *City of San Augustine v. Roy W. Green Company*, 548 S.W. 2d 467, 472 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). In determining whether there is any evidence of probative force to support the verdict, we are required

to view the evidence in the light most favorable to the party against whom the motion is sought and every reasonable intendment deducible from the evidence is to be indulged in that party's favor. *Id.* at 472.

Based on the record, we fail to see how the jury's verdict in the instant case could be construed to be the product of fraud and collusion between counsel for plaintiff and counsel for Mobil. All parties were represented in trial by highly competent attorneys; all the agreements, the legality of which is uncontested, were disclosed prior to trial in the presence of the trial judge and duly recorded by the court reporter. Counsel for appellant Gulf Offshore was given ample opportunity to question the attorneys for the plaintiff and appellee Mobil at that time.

Attorneys engaged in the trial of cases have heavy responsibilities, and must have latitude in making tactical decisions as how to best represent their clients within the bounds of propriety. *General Motors Corporation v. Hebert*, 501 S.W.2d 950, 957 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.). Under these facts, where appellee Mobil was unable to reach agreement with appellant Gulf Offshore on the issue of indemnity, it is understandable that counsel for Mobil would cooperate with counsel for plaintiff to limit Mobil's potential liability in the event Mobil did not obtain indemnity from Gulf Offshore. Point of error two is overruled.

Points of error three, four, five and six complain of the lack of evidence to support the judgment for contractual indemnity given the language in Section 15.4 of the contract. Section 15.4 states in pertinent part:

> Contractor [Gulf Offshore] shall protect, indemnify and save Mobil harmless against any and all

> claims, demands and causes of action of every kind and character arising in favor of any person, including both Mobil's and Contractor's employees, on account of personal injuries . . . occurring, growing out of, incident to, or resulting directly or indirectly from, the work to be performed by Contractor hereunder, whether such loss, damage, injury or liability arises from or is contributed to by the negligence of Mobil or its employees . . .

Appellant Gulf Offshore contends that the plaintiff's injuries were not incident to or the result of Gulf Offshore's work to be performed under the contract with Mobil.

We find sufficient evidence in the record to support the jury's answer to special issue four which inquired whether or not plaintiff's injuries were incident to, or resulted directly or indirectly from, the work to be performed by Gulf Offshore under its contract with Mobil. Plaintiff's own testimony that it was the normal thing to do to assist the last two Gulf Offshore employees off the platform even though an evacuation was in progress and that it was customary to help other Gulf Offshore employees in the regular course of their work was uncontroverted. The evidence elicited regarding the work operations on the platform justifies the jury's answer that the injuries suffered by the plaintiff were incident to, or resulting directly or indirectly from the work required. These points of error are overruled.

In points of error seven, eight and nine, appellant Gulf Offshore contends that Louisiana law, applied as controlling federal law in this case, and Texas law prohibit contractual indemnity between an oil company and a contractor unless there is insurance coverage or alternatively, that any liability for indemnity should be limited

to the amount of insurance required by the contract. Furthermore, appellant by relying on TEX. REV. CIV. STAT. ANN. art. 2212b (Vernon Supp. 1978-1979) urges that the public policy of the State of Texas prohibits contractual indemnity unless covered by insurance and then only to a maximum ceiling of $300,000.00.

43 U.S.C.A. § 1333 (a)(2) (1975), in effect at the time of this accident, states that:

> To the extent that they are applicable and not inconsistent with the subchapter [Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1331-1356 (1979)] or with other federal laws and regulations of the Secretary [of the Interior] now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States . . .

It is clear to this court that federal law, and decisions interpreting those laws, apply in this instance, and where there are no such laws or decisions, this court shall apply the laws and decisions of the State of Louisiana. The Outer Continental Shelf Lands Act makes it clear that federal law, supplemented by state law of the adjacent state, when not inconsistent with applicable federal law,

is to be applied to drilling rigs as artificial islands as though they were federal enclaves in an upland state. *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 353, 355 (1969). It is evident that federal law is exclusive in its regulation of this area, and that state law is adopted only as surrogate federal law. *Id.* at 357.

In *Day v. Ocean Drilling and Exploration Company*, 353 F. Supp. 1350 (E.D. La. 1973), a motion for summary judgment was presented to the federal district court regarding interpretation of a contract containing an indemnity agreement similar to the one in our case. The contract before that court provided minimum limits of $300,000.00 for insurance coverage of contractual liabilities and indemnities assumed by the contractor covering all claims "incident to, arising out of, in connection with, or resulting from the activities of Subcontractor, its employees and agents . . . or in connection with the work to be performed, services to be rendered, or materials to be furnished, under this contract . . ." *Id.* at 1351.

Plaintiff Day was working on a fixed platform located on the outer Continental Shelf. As he passed by a compressor, it suddenly exploded, injuring him.

Louisiana law was applied in *Day* as surrogate federal law to interpret the contract. The court held that while Louisiana courts have read such an indemnity agreement narrowly, the agreement must be given effect according to the intention of the parties. *Id.* at 1352. Judge Rubin did not limit his interpretation to any one of the phrases in the indemnity agreement, e.g. "arising out of" and "in connection with." Instead, taking the contract as a whole, the court held that it was the intention of the parties to require indemnity against all risks of harm with insurance

coverage and that such an indemnity agreement would be upheld.

We disagree with respect to the position taken by appellant Gulf Offshore that indemnity agreements are not enforceable under Louisiana law without insurance coverage. This issue was not reached in *Day* as insurance coverage was undisputedly provided pursuant to the contract in that case. In the two cases cited by appellant, *Dickerson v. Continental Oil Company*, 449 F.2d 1209 (5th Cir. 1971), and *Hicks v. Ocean Drilling and Exploration Company*, 512 F.2d 817 (5th Cir. 1975), the limits of liability for the indemnitors in both cases were limited to the amounts of insurance coverage provided in the respective contracts. Unlike the facts before us, in neither case was there any dispute as to the limits of liability contracted for or that insurance coverage was in fact obtained.

The record in this case does not reflect any proof as to the existence of insurance obtained to protect against the risks assumed by appellant Gulf Offshore or any limits of liability agreed to by the parties in their contract. During the trial, appellee Mobil tendered into evidence certain documents identified as the contract executed by appellant Gulf Offshore and appellee Mobil, without any objections from appellant Gulf Offshore.

Later, appellant Gulf Offshore discovered an Exhibit B was unattached to the contract admitted into evidence. In a post-trial proceeding, appellant sought to have the exhibit made a part of the record. The unattached exhibit allegedly stated what the limits of liability were. Having made no objection to the offer of the contract at trial, appellant has waived any complaint concerning the ex-

clusion of the exhibit. The trial court in the post-trial proceeding properly excluded the exhibit from the record since it was evidence on a controversial matter. *State v. Harrington*, 407 S.W.2d 467 (Tex. 1966), *cert. den.*, 386 U.S. 944 (1967); TEX. R. CIV. P. 270. For these reasons, we overrule as well appellant's alternative assertion that its liability for contractual indemnity should be limited to $100,000.00, that being the limit of liability allegedly required by the contract.

TEX. REV. CIV. STAT. ANN. art. 2212b (Vernon Supp. 1978-1979) declares indemnity provisions in agreements pertaining to wells for oil, gas, or water, or mines for other minerals, where there is negligence attributable to the indemnitee, void and unenforceable as against the public policy of the State of Texas, except if the parties agree in writing, that such indemnity obligation will be supported by liability insurance furnished by indemnitor, and then only to the limits of insurance agreed to be furnished.

We hold that this provision has no application to the instant case. Applying federal law pursuant to the Outer Continental Shelf Lands Act and Louisiana law as surrogate federal law, where not inconsistent with federal law, the indemnity agreement in this case does not fail as against the public policy of the State of Louisiana irrespective of the existence or non-existence of insurance. *Hicks v. Ocean Drilling and Exploration Company*, 512 F.2d at 826; *Dickerson v. Continental Oil Company*, 449 F.2d at 1221. Following Justice Guittard in *Mamlin v. Susan Thomas, Incorporated*, 490 S.W.2d 634, 636-37 (Tex. Civ. App.—Dallas 1973, no writ), we hold that the Texas concept of public policy cannot prevail against the national policy enunciated in a federal act as declared

by Congress in matters within its power. Points of error seven, eight and nine are overruled.

Appellant Gulf Offshore next urges error in the alignment of parties prior to the assignment of peremptory challenges and in the failure to equalize the challenges among the parties, thereby depriving appellant of a fair trial. Plaintiff Gaedecke was awarded twelve peremptory challenges and appellant Gulf Offshore and appellee Mobil were each awarded six peremptory challenges.

The granting of peremptory challenges depends on whether the interests of the parties within the meaning of TEX. R. CIV. P. 233 are, at least in part, antagonistic in a matter that the jury is to be concerned with. *Perkins v. Freeman*, 518 S.W.2d 532 (Tex. 1974). TEX. REV. CIV. STAT. ANN. art. 2151a (Vernon Supp. 1978-1979) requires the trial court, after alignment of the parties, to equalize the number of peremptory challenges.

The record on appeal consists of a partial statement of facts, the jury voir dire having been omitted. Antagonism between plaintiff and appellee Mobil was shown by the pleadings and none of the pre-trial concessions changed that. The record does not reflect in any manner how appellant was injured by the jury selection process.

Appellant assigns as error the refusal of four requested special issues which inquire about appellee Mobil's negligence as vessel-charterer of the Salton-Seahorse. Appellant contends that favorable answers to these special issues could have established the negligence of Mobil as vessel-charterer being the sole cause of plaintiff's injuries, thereby precluding contractual indemnity against appellant Gulf Offshore. 33 U.S.C.A. § 905 (b) (1978) precludes liability of an employer by agreement directly or in-

directly for injuries to an employee caused by the negligence of a vessel.

We do not find any evidence in the record nor do the pleadings reveal that the issue of sole cause was raised. TEX. R. CIV. P. 279 requires that when a case is submitted upon special issues, only those controlling issues made by the written pleadings and the evidence shall be submitted. There was evidence from which the jury could have found appellee Mobil negligent as a fixed platform operator or as a vessel-charterer. Given the jury's answers to the special issue actually submitted, finding Mobil negligent in the capacity as fixed platform operator, the result would not have changed. We find no error in the refusal to submit the requested issues.

In its last three points of error, appellant attacks the refusal to submit tendered instructions prohibiting consideration by the jury of inflationary trends or increases in productivity as factors affecting awards for future wage loss, the inapplicability of federal income taxes and the reduction of any future damage award to present value by the use of an appropriate interest rate prevailing at time of trial.

The trial court properly refused to permit the jury from considering evidence as to inflationary trends as an element of damages for future wage loss. *Davis v. Hill Engineering Company*, 549 F.2d 314 (5th Cir. 1977); *Johnson v. Penrod Drilling Company*, 510 F.2d 234 (5th Cir.) (en banc), *cert. den.*, 423 U.S. 839 (1975). Increases in productivity were not proper for consideration by the jury. *Davis v. Hill Engineering Company*, 549 F.2d at 335. *Davis*, *Johnson*, and another case cited by appellant, *Blue v. Western Railway of Alabama*, 469 F.2d 487 (5th Cir. 1972), *cert. den.*, 410 U.S. 956

(1973), do not hold that appellant would be entitled to an affirmative instruction prohibiting the jury's consideration of these factors. Furthermore, the record before us gives no indication that the jury in fact considered inflationary trends or increases in productivity in calculating the damages award.

Johnson v. Penrod Drilling Company, 510 F.2d at 236-37, specifically prohibits consideration by the jury by evidence or instruction, of the impact of income taxes in the calculation of a proper award for loss of future wages.

Davis, Johnson and *Blue* permit a trial court to admit evidence pertaining to the reduction of the award for future damages, to present value by the use of an appropriate interest rate prevailing at the time and place of trial. We hold that this was adequately provided for in the damage issue which was actually submitted and which inquired: "What sum of money, if any, if paid now in cash . . ." would reasonably compensate plaintiff Gaedecke. *Davis, Johnson*, and *Blue* do not hold that appellant would be entitled to an instruction solely directing the jury to apply an appropriate interest rate to reduce to present value any sum awarded for future damages. Points of error twelve, thirteen and fourteen are overruled.

Having carefully reviewed all the points of error and the authorities cited in the briefs, we accordingly affirm the judgment of the trial court.

/s/ Felix Salazar, Jr.
Justice

Judgment rendered, and Opinion filed December 12, 1979.

Panel consists of Associate Justices Coulson, Salazar and Junell.

APPENDIX B

RAISING THE FEDERAL QUESTION PRESENTED

THIRD PARTY DEFENDANT'S REQUESTED INSTRUCTION C

Filed: November 22, 1978. Ray Hardy, District Clerk, Harris County, Texas. By R. Trinkle, Deputy.

Requested Instruction No. C

You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes.

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ALEXANDER L. STEVAS,
CLERK

NO. 82-369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK CATON
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323

Counsel of Record for Mobil Oil Corporation

Of Counsel:

CRAIN, CATON, JAMES & WOMBLE
THOMAS B. GREENE, III
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

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NO. 82-369

IN THE

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OCTOBER TERM, 1982

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Respondent, Mobil Oil Corporation, prays that this Court deny a Writ of Certiorari to issue to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas entered in this cause on January 28, 1982.

STATEMENT OF THE CASE

The section of the Petition entitled "Statement of the Case" and the opinion below generally set out what has previously transpired.

SUMMARY OF RESPONDENT'S ARGUMENT IN OPPOSITION TO THIS COURT GRANTING THE WRIT OF CERTIORARI

I.

The Rule of *Liepelt* Does Not Apply in an Outer Continental Shelf Lands Act Case.

a. *Liepelt* does not further the congressional purpose of the Outer Continental Shelf Lands Act as it applies to suits for personal injuries.

b. Traditional considerations for the application of federal common law to a particular situation are not present here.

c. *Liepelt* has not been applied in similar cases.

II.

The Decision of the Court of Civil Appeals Conflicts with Neither this Court's Opinions Nor Opinions of the Fifth Circuit.

a. Because *Liepelt* does not apply to Outer Continental Shelf Lands Act cases as federal common law, it does not conflict with applicable state law.

b. The Fifth Circuit cases cited by Petitioner are readily distinguishable.

III.

Failure to Give the Proposed Instruction was Harmless Error, if Error were Committed.

ARGUMENT

I.

THE RULE OF *LIEPELT* DOES NOT APPLY IN AN OUTER CONTINENTAL SHELF LANDS ACT CASE.

To guide the Texas Court of Civil Appeals on remand, this Court noted "[t]o apply the statutory directive a court must consider the content of both potentially applicable federal and state law." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 (1981). As mandated, the Court of Civil Appeals found that Louisiana law makes the giving of an explanatory instruction to a jury that its award is not subject to income taxes discretionary with the trial court. *Gulf Offshore Co. v. Mobil Oil Corp.*, 628 S.W.2d 171 (Tex. Civ. App.—Houston [14th Dist.] 1982), writ ref'd n.r.e. Although Petitioner suggests that this Court may review that aspect of the lower court's opinion (Petition at p. 7, n.3), Respondent would submit that this Court's jurisdictional grant does not include a determination of the content of state law. *Henry v. Mississippi*, 379 U.S. 443, 446 (1965); *see*, 28 U.S.C. § 1257. Furthermore, Petitioner has not designated a point of error concerning Louisiana law, and it is therefore not subject to review by this Court. Rules of the Supreme Court 21.1(a). The relevant question at this juncture is therefore does the cautionary instruction concerning income taxes promulgated in *Norfolk & Western R.R. Co. v. Liepelt*, 444 U.S. 490 (1980) apply to this case.

By definition, the rule pronounced in *Liepelt* is "federal common law", that being a "law of independent federal judicial decision." *United States v. Standard Oil Co.*, 332

U.S. 301, 308 (1947). Strictly read, *Liepelt* applies only to actions brought under the Federal Employers Liability Act, 45 U.S.C. §§ 51 et seq. This Court stressed in *Liepelt* that "questions concerning the measure of damages in an FELA action are federal in character." 444 U.S. at p. 493. Although the Outer Continental Shelf Lands Act makes any law applied regardless of its source "federal law", the fact that the *Liepelt* rule is federal decisional law does not of itself mean that it applies in this case.

a. The Rule of *Liepelt* Does Not Further the Congressional Purpose of the Outer Continental Shelf Lands Act as it Applies to Suits for Personal Injuries.

The declared congressional purpose of the Outer Continental Shelf Lands Act is to subject the subsoil and seabed of the Shelf to federal control and jurisdiction. 43 U.S.C. § 1332. The Act was passed "solely to regulate the leasing and development . . . of the oil potential of the Continental Shelf." *Continental Oil Co. v. Federal Power Commission*, 370 F.2d 57, 67 (5th Cir. 1966), *cert. denied*, 388 U.S. 910 (1967), citing H.R. Rep. No. 413, 83rd Cong., 1st Sess. 2-3 (1953), 2 U.S. Code Cong. & Ad. News p. 2178 (1953). Congress wanted federal control over these areas and indeed dictated that they would be treated as federal enclaves located within a state. 43 U.S.C. § 1333(a)(1). Congress looked, however, to adjoining state law for the "social laws" necessary for the protection of the workers. This Court has on three occasions taken note of the "special relationship between the men working on these artificial islands and the adjacent shore to which they commute to visit their families."

Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 365 (1969); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 103 (1971); and *Gulf Offshore Co. v. Mobil Oil Corp., supra*, 453 U.S. at p. 484.

The Petitioner argues that this case differs from *Huson* because since federal law on a particular subject, i.e. cautionary instructions regarding taxation of awards, already exists, the court would not be "creating" federal common law but applying existing law. There is, therefore, no gap to be filled by state law. But to apply a relatively new (1980) common law principle to the Outer Continental Shelf where a body of state personal injury law is generally thought applicable is in essence the *creation* of a new federal common law rule for that situation, which is precisely what this Court warned against in *Huson*.[1] Congress specified that a *comprehensive body* of state law should apply. 404 U.S. at p. 104. This Court emphasizes the "substance of the remedy." 404 U.S. at p. 103. Just as a time limitation on suit is part of the substance of the remedy, so is the measure of damages. The damages are state law created, although federally applied, and are therefore not "federal in character," calling for the application of *Liepelt*.

b. The Traditional Considerations for the Application of Federal Common Law to a Particular Situation are not Present Here.

This Court has cited several factors that are important in determining whether a uniform federal common law will apply in specific circumstances. These factors include

1. "Thus, Congress . . . did not intend that federal courts fill those 'gaps' themselves by creating new federal common law." 404 U.S. at pp. 104-105.

a consideration of federal policy, the "groundings of the actions", the legal interest in relations of the federal government, and "a variety of considerations always relevant to the nature of the specific governmental interest and to the effects upon them of applying state law." *United States v. Standard Oil Co., supra,* 332 U.S. at p. 310. The court must be alert to provide remedies necessary to effectuate congressional purpose, but the creation of such remedies should not be done where the remedies sought would not aid the primary congressional goals. *Cort v. Ash,* 422 U.S. 66, 84 (1975). The congressional purpose as related to social legislation dealing with personal injuries is not furthered by uniform federal common law relating to damages. Indeed, the Supreme Court has specifically rejected a need for uniformity in Outer Continental Shelf Lands Act cases in *Huson* by its holding that the statute of limitations for each state applies.[2]

The measure of damages under state law controls in suits brought under the Outer Continental Shelf Lands Act. Indeed, the plaintiff in *Rodrigue* urged that Louisiana law rather than the Death on the High Seas Act was applicable because it provided more elements of damage.

The courts are more likely to invoke a uniform federal common law in cases where the United States is a party to the litigation. *See, e. g., Bank of America National Trust & Savings Ass'n v. Parnell,* 352 U.S. 29, 33-34

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2. A quick example of how the rights of offshore workers differ from state to state involves an examination of three Gulf states' statutes of limitation: a Texas offshore worker would be controlled by a two-year statute of limitations, TEX. REV. CIV. STAT. ANN., ART. 5526; a Louisiana worker would be confronted with a one-year prescription statute, LA. CIV. CODE ANN. ART. 3536; and a Mississippi worker would have the luxury of a six-year statute of limitations, MISS. CODE ANN. § 14-1-49.

(1956). By definition, the United States is a party in cases filed under the Federal Tort Claims Act, which provides for government liability "in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U.S.C. § 2674. The Federal Tort Claims Act assimilates into federal law the rules of substantive laws of the several states with their "notorious divergencies." *Feris v. United States*, 340 U.S. 135, 142 (1950). The court must apply the whole law of the state. *Richards v. United States*, 369 U.S. 1, 11 (1962). The courts have refused to apply *Liepelt* to cases on file against the United States government under the Federal Tort Claims Act: *Erickson v. United States*, 504 F.Supp. 647 (D.S.D. 1980); *Draisma v. United States*, 492 F. Supp. 1317, 1327 (W.D. Mich. 1980).

c. *Liepelt* has Not Been Applied in Similar Cases.

Liepelt has been applied in FELA suits and suits brought under the Jones Act or general maritime law. These situations involve federal causes of action whose damages are federal in character with a long recognized need for uniformity. *Liepelt* has not been applied, however, to cases that are more analogous to personal injuries arising on the Outer Continental Shelf:

1. Diversity Cases: *Croce v. Bromley Corp.*, 623 F.2d 1084 (5th Cir. 1980) *cert. denied*, 450 U.S. 981 (1981); *Fenasci v. Travelers Insurance Co.*, 642 F.2d 986 (5th Cir.) *reh. denied*, 648 F.2d 446 (1981); *Estate of Spinosa v. International Harvester Co.*, 621 F.2d 1154 (1st Cir. 1980); *In Re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 526 F.Supp. 226 (N.D. Ill. 1981); *Gerbich v. Evans*, 525 F.Supp. 817 (D. Col. 1981).

2. Federal Tort Claims Act. *Erickson v. United States, supra; Draisma v. United States, supra.*

3. Federal enclave litigation. Federal legislation provides that when one sustains a personal injury in any national park or other federal enclave within the exterior boundaries of any state, the rights of the parties shall be governed by the laws of the surrounding state. 16 U.S.C. § 457. This presents an identical situation to suits for personal injuries arising on the Outer Continental Shelf. The only case to consider whether *Liepelt* applies in this federal enclave litigation has affirmed the trial court's refusal to permit evidence of the effect of income tax or instruct the jury regarding the non-taxability of a damage award per state law. *Vasina v. Grumman Corp.*, 644 F.2d 112, 118 (2d Cir. 1981).

II.

THE DECISION OF THE TEXAS COURT OF CIVIL APPEALS CONFLICTS WITH NEITHER THIS COURT'S OPINIONS NOR THE OPINIONS OF THE FIFTH CIRCUIT.

a. Because *Liepelt* Does Not Apply to Outer Continental Shelf Lands Act Cases as Federal Common Law, it does not Conflict with Applicable State Law.

As explained, *supra*, *Liepelt* does not apply either by its own terms or by utilizing appropriate common law analysis to cases arising on the Outer Continental Shelf. The applicable state law makes a *Liepelt* instruction discretionary with the trial court. There is therefore no conflict with opinions of this Court.

b. The Fifth Circuit Cases Cited by Petitioner are Distinguishable.

Petitioner cites two Fifth Circuit cases that are allegedly in conflict with the decision of the Texas Court of Civil Appeals. In *Berry v. Sladco, Inc.*, 495 F.2d 523 (5th Cir. 1974), the Fifth Circuit considered when interest should accrue on a judgment for personal injuries. Under Louisiana law, interest accrues from the time of judicial demand. A federal statute, however, 28 U.S.C. § 1961, provides that interest shall be calculated from the date of the entry of judgment. The court decided that the federal *statute* was applicable and mandatory and therefore prevailed because it was inconsistent with Louisiana law.

In *Continental Oil Co. v. London Steam-Ship Owners Mutual Insurance Ass'n, Ltd.*, 417 F.2d 1030 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970), a vessel collided with an artificial island on the Outer Continental Shelf. The court held that the suit by the platform owner against the vessel was "clearly a maritime claim under the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740." 417 F.2d at p. 1032. There was thus federal law made applicable to the situation by statute.

III.

THE TRIAL COURT'S REFUSAL TO SUBMIT A CAUTIONARY INSTRUCTION REGARDING TAXATION OF DAMAGE AWARDS WAS HARMLESS ERROR, IF ERROR WERE COMMITTED.

In its previous opinion, this Court gave the Texas Court of Civil Appeals the opportunity to consider wheth-

er the trial court's failure to give the cautionary *Liepelt*-like instruction was harmless error. The state court did not have to decide that point. The harmless error rule applies both in Texas state (TEX. R. CIV. PROC. 434) and federal litigation (28 U.S.C. § 2111). The burden of proof to show harmful error is on the petitioner. *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943). For a court to find the error in failing to give a cautionary instruction reversible "there ought to be evidence either that juries in general increase recoveries on this account or that particular jury did." *McWeeney v. New York, N.H. & Hartford R.R.*, 282 F.2d 34, 39 (2d Cir. 1960). The Petitioner must show that the jury did, in fact, operate under a false impression of the tax laws. *Raycraft v. Duluth, Missabe & Iron Range Railway*, 472 F.2d 27 (8th Cir. 1973). Jury instructions are subject to the harmless error rule and the appellant has the burden to establish the prejudicial effect of the trial court's refusal to give the requested instruction. *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980).

Petitioner has never contended that the verdict was excessive. Indeed, the jury award of $900,000 is less than the plaintiff's evidence on lost wages alone, without taking into consideration any recovery for pain and suffering.[3]

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3. The evidence established that Plaintiff had a life expectancy of 41.8 years, and work life expectancy of 32 years at the time of trial (Statement of Facts p. 323). Plaintiff was being compensated at the rate of $4.04 per hour, with time and a half for overtime, working in excess of 12 hours per day, 7 days a week. (Statement of Facts pp. 191-193). Plaintiff also received free room and board while on the rig. (Statement of Facts p. 68). The Plaintiff's attorneys submitted to the jury that Plaintiff's wages and benefits amounted to $16,910.40 per year (Jury Argument p. 14) and testimony was received that the wages increased at a rate of 10 percent annually. (Statement of Facts p. 192). A 5 percent increase in income over

CONCLUSION

For the foregoing reasons, Respondent, Mobil Oil Corporation, would respectfully submit that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,



FRANK CATON
Attorney for Respondent

Of Counsel:

CRAIN, CATON, JAMES & WOMBLE
THOMAS B. GREENE, III
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323

---

the Plaintiff's work life expectancy rather than 10 percent argued by Plaintiff, yields an anticipated gross income of $1,856,000 and after deducting the Plaintiff's anticipated earnings over his work life expectancy, the jury would still be left with the figure of approximately $1,500,000. After applying a discount rate of six percent, which was argued by the Plaintiff's counsel without objection from Petitioner, the jury would be left with an after tax income in excess of $1,000,000. The Plaintiff furthermore argued without objection that he had sustained $63,500 in accrued lost wages.

CERTIFICATE OF SERVICE

I, FRANK CATON, a member of the Bar of this Court and counsel for Mobil Oil, hereby certify that:

1. All parties required to be served in this proceeding have been served;

2. Three copies of the foregoing Brief in Opposition have been served on counsel of record for each of the other parties separately represented in this proceeding at their post office addresses as follows:

Mr. Bradley A. Jackson, Esq.
Royston, Rayzor, Vickery & Williams
2200 Texas Commerce Tower
Houston, Texas 77002

Mr. Joseph D. Jamail
Jamail, Kolius & Mithoff
3300 One Allen Center
Houston, Texas 77002

3. Service on each of such parties were made on the 30th day of September, 1982, by depositing said copies of this Brief in Opposition in a United States post office, first class postage prepaid, and addressed to the above-named counsel.

Frank Caton

FRANK CATON

Office - Supreme Court, U.S.
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CLERK

NO. 82-369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

On Petition For Writ of Certiorari To The Court of Appeals For The Fourteenth Supreme Judicial District of Texas

BRIEF OF RESPONDENT STEVEN GAEDECKE IN OPPOSITION TO PETITION FOR CERTIORARI

JOSEPH D. JAMAIL
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000
Counsel of Record for Respondent Steven Gaedecke

Of Counsel:

JAMAIL, KOLIUS & MITHOFF
GUS KOLIUS
JOHN B. NEIBEL
NAT B. KING
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

I

QUESTIONS PRESENTED FOR REVIEW, IF ANY

Respondent Gaedecke,[1] being dissatisfied with the presentation of petitioner, submits the following:

1. Gulf's petition presents *nothing* for review:

This court failed to decide the applicability of the *Liepelt*[2] nontaxability rule to this case, but remanded that question to the Texas Court of Appeals for determination. That court having done so, and the Texas Supreme Court having refused to review its decision, the matter has been terminally adjudicated.

2. Alternatively:

(a) Does the *Liepelt* rule displace the state (Louisiana) rule (which does not *require* a nontaxability jury instruction in a personal injury suit) in this Outer Continental Shelf Lands Act (OCSLA)[3] case?

(b) In any event, was the failure to give a *Liepelt* instruction in this case harmless error?

---

1. The Parties are referred to by abbreviated name "Gulf", "Mobil", "Gaedecke".

2. *Norfolk and Western Railway Company v. Liepelt*, 444 U.S. 490, a Federal Employers Liability Act (FELA), 45 U.S.C. Sec. 51 et seq., wrongful death case.

3. 43 U.S.C. Sec. 1331 et seq. We employ the U.S.C. citations prior to the recodification of OCSLA in 1978, as did this Court in its opinion in Cause No. 80-590. 453 U.S. 473, n.5.

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On Petition For Writ of Certiorari To The Court of Appeals For The Fourteenth Supreme Judicial District of Texas

BRIEF OF RESPONDENT STEVEN GAEDECKE IN OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

Respondent Steven Gaedecke ("Gaedecke"), plaintiff in the trial court and a party to the proceeding in the court whose judgment is sought to be reviewed, requests this Court to deny the petition for certiorari filed herein by petitioner Gulf Offshore Company, a Division of the Pool Company ("Gulf").

OPINION BELOW

The opinion of the Texas Court of Appeals on remand from this Court is reported at 628 S.W.2d 171, and reproduced in petitioner's Appendix A-1.

JURISDICTION

Jurisdictional requisites are adequately set forth in the petition, p. 2.

STATUTES INVOLVED

The statutes involved are adequately set forth in the petition, pp. 2-4.

STATEMENT OF THE CASE

The facts material to the questions presented appear in the opinion of the Texas Court of Appeals, petitioner's Appendix A-1.

SUMMARY OF THE ARGUMENT

I.

As This Court Delegated To The Texas Court Of Appeals The Decision As To Whether A *Liepelt* Nontaxability Instruction Is Applicable In This OCSLA Personal Injury Case, The Latter's Decision Is Final.

1. The Court previously granted certiorari in this case to specifically consider whether a jury instruction that personal injury damages are not taxable is appropriate in an OCSLA case. 453 U.S. at 477. All parties briefed and argued that point.

2. Instead of deciding the matter, this Court remanded the case to the Texas Court of Appeals for determination because of the Court's dubitante as to the applicability of *Liepelt* to the case at bar. By not deciding the question itself, it must be assumed that the decision of the Court of Appeals was anticipated and is now *final.*

II.

As *Liepelt*, A FELA Wrongful Death Case, Is Not "Applicable" To This OCSLA Personal Injury Case It Does Not Displace Louisiana Law.

1. As the federal common law enunciated in *Liepelt* is not "applicable" to OCSLA, state law remedies adopted as federal surrogate law cannot be "inconsistent" therewith.

2. OCSLA provides no federal remedy or cause of action for personal injuries suffered on the shelf. This "gap" is filled by state law adopted as federal surrogate law. Congress rejected uniformity and borrowed a Louisiana remedy which does not make a nontaxability instruction mandatory; thus *Liepelt* does not displace adopted state law.

3. Congress did not intend that the "gaps" in federal law in this case be filled with new federal common law. On the contrary it was to be filled by *state law adopted as federal surrogate law.*

4. The courts have uniformly restricted *Liepelt* to FELA cases.

III.

In Any Event, Failure To Give A *Liepelt* Instruction Was Harmless Error.

1. Error is not presumed, thus Gulf has the burden of showing that prejudice resulted from the failure to give a *Liepelt* instruction under the *uncontested* facts of the case at bar.

2. Gulf was not prejudiced because:

(a) The evidence fully supports the jury's verdict and does not indicate it was operating under any misconceived notion of the tax laws;

(b) It does not contend that the verdict is not supported by the evidence.

ARGUMENT

I.

BY REMANDING TO THE TEXAS APPEALS COURT WITHOUT DECISION THE QUESTION OF WHETHER THE STATE RULE AS TO TAXABILITY OF PERSONAL INJURY AWARDS IS DISPLACED BY *LIEPELT* IN AN OCSLA CASE, THIS COURT AUTHORIZED THE TEXAS COURT TO MAKE A FINAL DETERMINATION OF THE MATTER.

The reason this Court remanded this case to the Texas Court of Appeals was its doubt that *Liepelt* controls an OCSLA case because: (1) Congress in that Act "borrowed a remedy provided by state law and thereby 'specifically rejected national uniformity' as a paramount

goal",[4] and (2) Congress in providing for filling the "gaps" in federal law "did not intend that federal courts fill those 'gaps' themselves by creating new federal law". 453 U.S. at 487-488. The Texas Court of Appeals said (628 S.W.2d at 174):

> If the Supreme Court had not intended this very decision [*Liepelt* is *not* "applicable"] it would not have expressed doubt about the application of the *Liepelt* rule and would have decided the question itself and not remanded to this Court for determination.

This conclusion by the Texas Court of Appeals is obviously "just under the circumstances". 28 U.S.C. Sec. 2106.[5]

On remand the Texas court was free to determine the federal questions not determined by this Court. *Wilson v. Cook*, 327 U.S. 474, 489 (1946). It was not "imprisoned within an adjudication to be attributed to this Court which this Court never made". *Ex Parte State of Texas*, 315 U.S. 8 (1942). Also see: *Johnson v. Board of Education of the City of Chicago*, 102 S.Ct. 2223, 2224 (1982); *Quern v. Jordan*, 440 U.S. 332, 347, n.18 (1979).

Lummus Company v. Commonwealth Oil Refinery Company, 297 F.2d 80, 89-90 (2nd Cir. 1961), cert. den. 368 U.S. 986, held that when considering a decision not avowedly tentative, "finality"

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4. A principal reason for the decision in *Liepelt* was that one of the purposes of FELA was to "create uniformity throughout the Union." 444 U.S. 493, n.5.

5. 28 U.S.C. Sec. 2106 authorizes the Court to remand a cause and require "such further proceedings to be had *as may be just under the circumstances.*" (emphasis ours)

> "May mean little more than that the litigation of a particular issue has reached a stage that a court sees no really good reason for permitting it to be litigated again."

While not technically "issue preclusion," it is submitted that the reasoned opinion of the Texas Court of Appeals suffices to bring this case, after six years of litigation in six courts, to the stage that there is no good reason to once again relitigate whether *Liepelt* is applicable to the case at bar. *Finis Rei Atendendus Est.* 3 Coke Inst. 5.

II.

AS *LIEPELT*, A FELA WRONGFUL DEATH CASE, IS NOT "APPLICABLE" TO THIS OCSLA PERSONAL INJURY CASE, IT DOES NOT DISPLACE LOUISIANA LAW.

1. Louisiana law does not require a nontaxibility instruction in a personal injury case.

This Court remanded this case to the Texas Court of Appeals for a determination of "whether Louisiana law *requires* the [*Liepelt*] instruction." 453 U.S. at 488. (Emphasis ours). The Texas court held "such a jury instruction is not mandatory." 628 S.W.2d at 173.

Gulf gives no reason why that holding is error, and as it is not set forth as "a question presented for review" in its petition, it is not before this Court. S. Ct. Rule 21.1 (a); *Andrews v. Louisville & National Railroad Company*, 406 U.S. 320, 324-325 (1972). We thus start from the undisputed premise that Louisiana law does *not* require a *Liepelt* instruction.

2. The inapplicability of *LIEPELT*.

OCSLA mandates that the laws of the adjacent state (here Louisiana) *apply as surrogate federal law* to the extent they are (1) "applicable" and (2) "not inconsistent" with other federal laws (here federal common law). 43 U.S.C. Sec. 1333(a)(2).

In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 359 (1969) the Court held that under OCSLA "for federal law to oust adopted state law, federal law must first *apply*." (Emphasis added). In *Chevron Oil Company v. Huson*, 404 U.S. 97, 101 (1971) the Court held that "state law remedies are not 'inconsistent' with *applicable* federal law." (Emphasis added). Ergo: If the federal common law enunciated in *Liepelt* is not *applicable*, it cannot be *inconsistent* with state law remedies adopted as federal law. It is submitted that that is the exact posture of this case.

Following the criteria laid down in *Cort v. Ash*, 422 U.S. 66 (1975), the Fifth Circuit in an exhaustive opinion in *Olsen v. Shell Oil Company*, 561 F.2d 1178 (5th Cir. 1977), cert. den. 444 U.S. 979, reached the conclusion that OCSLA affords a worker injured on the Shelf no remedy or cause of action, but on the contrary, requires him "to look to state law for redress" and that such a controversy "should be controlled by state law." 561 F.2d at 1190. State law, said the court, should govern the controversy "not solely because there are 'gaps' in the Federal Code", but because Congress recognized "that the individual states had a very real interest in the workers on these platforms." 561 F.2d at 1189.

Thus the only *ad damnum* state law with which counsel for a worker injured on a drilling rig off the coast of

Louisiana would be familiar would be Louisiana law. *Huson*, supra, 404 U.S. at 103. As Congress' goal, according to *Huson*, was to provide a "familiar body of law," it would defeat that goal if a plaintiff was obliged to apply, not Louisiana law, but federal common law *that was nonexistent when a case was tried*, as in the case at bar.

There being no OCSLA remedy for personal injuries suffered on the shelf, Gaedecke was relegated to a Louisiana cause of action which embraced the *whole body* of Louisiana law, not parts of it. *Huson*, 404 U.S. at 105, n.8. "The federal borrowing under the Lands Act is *all inclusive*." *Bonner v. Chevron U.S.A.*, 668 F.2d 817, 819 (5th Cir. 1982). (emphasis ours) Congress borrowed Louisiana law as the *only* remedy, there being no other, for personal injury suits in OCSLA cases and Louisiana law does not make a *Liepelt* instruction obligatory.

3. Filling the "gaps."

Gulf says "if there is no 'gap' in the federal law, it is not necessary to 'borrow' state law." Pet. p. 11. But there was and is a "gap".

A "gap" exists in federal law in this case because there is no federal *remedy* for an OCSLA personal injury case. In *Huson*, the Court said the intention of Congress is that this gap be filled with the applicable body of state (Louisiana) law, not by federal courts "creating new federal common law". 404 U.S. at 101, 104-105. This was reiterated in the case at bar: We recognized that "congress made clear provision for filling the 'gaps' in federal law; it did not intend that federal courts fill those 'gaps' themselves by creating new federal common law." 453 U.S. at 487-488.

To grant the petition the Court would be obliged to hold that ex post facto federal common law should fill the "gaps" rather than the whole applicable body of state (Louisiana) law. This would be in the face of *Huson* and what the Court said in the instant case.

4. *LIEPELT* is restricted to FELA cases.

The case at bar is a common law negligence suit for *personal injury; Liepelt* is a statutory FELA *wrongful death action.* The courts have without exception refused to apply *Liepelt* to any case other than one arising under FELA:

(a) *Diversity cases: Estate of Spinosa v. International Harvester Company,* 621 F.2d 1154, 1158-1159 (1st Cir. 1980); *Croce v. Bromley Corp.,* 623 F.2d 1084 (5th Cir. 1980); *Vasina v. Grumman Corp.,* 492 F.Supp. 943, 945 (E.D. N.Y. 1980), aff. 644 F.2d 112, 118 (2nd Cir. 1981); *In Re Air Crash Disaster Near Chicago, Ill., etc.,* 526 F.Supp. 226, 229-230 (D.C. Ill. 1981); *Gerbich v. Evans,* 525 F.Supp. 817, 819 (D.C. Colo. 1981);

(b) *Federal Tort Claims Act cases: Draisma v. United States,* 492 F.Supp. 1317, 1327 (W.D. Mich. 1980).

Croce says that as *Liepelt* arose under FELA and not under a state statute that *"this distinction is crucial"*. 623 F.2d at 1098 (Emphasis ours).

Draisma held that as *Liepelt* was a FELA case in which damages is a federal question, it would not control where damages is a state question (as it is de facto in the case at bar). 492 F.Supp. at 1327.

In Re Air Crash Disaster states that *"Liepelt* dealt with the narrow realm of actions brought under the FELA, and did not purport to address the issues of the propriety of instructions concerning taxation outside the context of the FELA". 526 F.Supp. at 229. The Court further held that this Court's decision *in the case at bar* "indicates that the 'federal common law rule' of *Liepelt* is limted to situations similar to those in which it arose". Ib. at p. 230.

5. Alleged conflicts with this Court and with the Fifth Circuit.

Gulf says "compelling reasons" why its petition should be granted are that the decision of the Texas Court of Appeals "is in direct conflict" with the express language of the statute and the decisions of this Court and of the Fifth Circuit. Pet. pp. 7, 8. The trouble with this is that this point is not set forth as "a question for review" as required by S.Ct. Rule 21.1 and thus not before the Court for review. See subpoint II, 1., supra.

But if it was:

(a) The statutory language, 43 U.S.C. Sec. 1333(a)(2), makes only *applicable* federal law oust adopted state law. As the federal common law rule of *Liepelt* is not *applicable,* it does not oust state law, adopted as federal surrogate law dealing with jury instructions.

(b) To say, as Gulf does, Pet. pp. 9, 10, that the decision of the Texas Court of Appeals is in direct conflict with *Liepelt* is to assume what it seeks to prove. Certainly enough has been said to demonstrate that no such conflict exists. See subpoints II, 2, 3, 4, supra.

(c) *Berry v. Sladco, Inc.,* 495 F.2d 523 (5th Cir. 1974) applied federal statutory law that calculates interest

from the date of judgment, rather than Louisiana statutory law that computes interest from the date of judicial demand. Louisiana statutory law was undeniably inconsistent with federal statutory law. But in that case, there were no *gaps* in federal law to be filled by Louisiana law, unlike the case at bar. See subpoint II, 3, supra.

(d) *Continental Oil Co. v. London Steamship Own. Mut. Ins. Assn. Ltd.*, 417 F.2d 1030 (5th Cir. 1969) simply held that as there was a "fully effective maritime right and remedy," 417 F.2d at 1035, the Louisiana direct action statute was not "applicable" federal law. In the case at bar, the *only* "right and remedy" was provided by Louisiana law. See subpoints II, 2, 3, supra.

III.

ASSUMING ARGUENDO THAT *LIEPELT* APPLIES TO THE INSTANT CASE, FAILURE TO CHARGE THE JURY AS TO THE NONTAXABILITY OF FEDERAL INCOME TAXES WAS HARMLESS ERROR.

The Texas Court of Appeals did not reach the question of harmless error as it held *Liepelt* did not displace state law in an OCSLA case. 628 S.W.2d 175. But in any event, Gulf was not "prejudiced" by failure to give a *Liepelt* jury instruction.

1. Gulf's burden.

28 U.S.C., Sec. 2111 specifically requires that judgment on certiorari shall be given "without regard to errors which do not affect the substantial rights of the parties." A petitioner for certiorari thus has "the burden of show-

ing error in the judgment he asks us to set aside." *Higgins v. Carr Bros. Co.*, 317 U.S. 337, 338 (1943); *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943). "Error is not presumed but must be affirmatively shown." 7 *Moore's Federal Practice*, Sec. 61.11, n.13 (2nd Ed. 1982).

Each case stands on its own proceeding "in its entirety." *Kotteakos v. United States*, 328 U.S. 750, 762 (1946). And the harmless error rule embraces jury instructions. See *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629 (1959).

2. *Flanigan* and *Vanskike*.

In *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980), cert. den. 450 U.S. 921, a FELA personal injury case, the Court:

(a) Held there is no hypothesis that a failure to give a nontaxability instruction causes juries to increase awards; but on the contrary there is empirical data that juries in general do not increase recoveries in the belief that they are subject to income tax, citing Kalven, *A Report on the Jury Project*, Conference on the Aims and Methods of Legal Research, University of Michigan Law School, 167-168 (1957), (632 F.2d at 890);

(b) Said that the *Liepelt* award was not supported by even the plaintiff's evidence; was a wrongful death case where plaintiff's proof concentrated on his loss of pecuniary earnings and contribution to his dependents; whereas *in the personal injury case before it* plaintiff was not only entitled to loss of future income but also *compensation for substantial pain and suffering* (Ib.);

(c) Noted particularly that the railroad was not prevented (nor was Gulf in the case at bar) from offering evidence of net earnings as was the railroad in *Liepelt*, and had failed to point out any evidence that the jury inflated its award on the erroneous belief that the award would be taxable, but on the contrary,

> [T]he evidence fully supports the jury's verdict and indicates the jury was not operating under any misconceived notions of the tax laws. (Ib.).

Therefore, without evidence of an excessive verdict, as in *Liepelt*, the Court found no reversible error. Accord: *Ingle v. Illinois Cent. Gulf R. Co.*, 608 S.W.2d 76, 83 (Mo. App. 1980).

The eighth circuit followed *Flanigan* in *Vanskike v. ACF Industries*, 665 F.2d 188 (8th Cir. 1981), a FELA case, saying (1) "The question is whether the defendant can show that the jury was operating under a false impression of the tax law," 678 F.2d at 207, and (2) "A great disparity between the evidence and the verdict would be one indication that the jury did operate under such a false impression" Ib.

As there was testimony in *Vanskike* that plaintiff's past lost wages were $108,654.00 and future wages were $583,291.00 and he was entitled to be compensated for medical expenses and for pain and suffering, the court held there was not "such a great disparity between the evidence and the award as to indicate that the jury increased the award because of a mistaken belief that the verdict would be subject to income taxes" (Ib.).

3. *LIEPELT* is actually an excessive verdict case.

"Opinions must be read in the setting of the particular cases and the product of preoccupation with the special facts". *Freeman v. Hewitt*, 329 U.S. 249 (1946).

Ingle, supra, 608 S.W.2d at 63, says the purpose of *Liepelt* was to prevent the rendering of an excessive verdict. The Court itself actually refers to preventing "overcompensation to plaintiff." *Liepelt*, 444 U.S. at 498.

In *Liepelt*, this Court of necessity restricted itself to the facts before it and decided that the jury's verdict was, *under the evidence*, excessive. *Liepelt's* expert produced a damage total reduced to present value of $302,000. 444 U.S. at 492. The railroad unsuccessfully offered to prove by its own expert that the net pecuniary loss was $138,327. The jury returned a verdict of $775,000! This made the award over *two and one-half times* the amount supported by the evidence. On these facts the case becomes no more than ordinary case of an excessive verdict without evidentiary support.

4. Gulf does not claim the verdict is excessive; in fact it was fully supported by the evidence.

Gulf did not pursue in the appellate courts its trial court claim that the damage award was without support of the evidence (Tr. 311; Gulf's points of error in the Texas Court of Civil Appeals, Brief for Appellant, p. 413). Gulf's excessive damage claim was therefore, abandoned, *Bickler v. Bickler*, 403 S.W.2d 354, 361 (Tex. 1966), and any error rendered harmless. *Schybinger v. Interlake Steamship Company*, 273 F.2d 308, 314 (7th Cir. 1959).

This noncontroversial defense as to damages brings the instant case within the parameters of *Grunenthal v. Long Island Railroad Company*, 393 U.S. 156 (1968). *Grunenthal* was a FELA case in which the jury awarded plaintiff $305,000. The Court of Appeals entered a remittitur damna for $105,000. This Court reversed because after a detailed appraisal of the damage evidence it found the trial judge's estimate of the value of the factors which the jury considered supported by the evidence. After balancing those factors (wages before trial, future wages and pain and suffering), the Court found the *aggregate* award proper. It approved the trial judge's finding: "nothing untoward, inordinate, unreasonable or outrageous, nothing indicative of a runaway jury or one that lost its head." 393 U.S. at 160.

It is submitted that the aggregate of all the damage factors in the case at bar show that the *total amount* of the verdict is fully supported by the evidence.[6] As in *Grunenthal*, the *damages in this case, in contrast to LIEPELT, are noncontroversial and Gulf does not contest them.*

In sum, any error in failing to give a *Liepelt* instruction was cured by the verdict. 11 Wright and Miller, *Federal Practice and Procedure*, Sec. 2886, pp. 290, 291, n.71 (1973); 5A C.J.S. Sec. 1776(b); *Smith v. Brady*, 390 F.2d 176, 177-178 (4th Cir. 1968).

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6. The total award to Gaedecke is $900,000.00 Future lost earnings alone were $1,300,000.00 *without considering physical pain, mental anguish or physical impairment*. Gaedecke was hospitalized sixty days on five different occasions, had three major operations and his injuries and pain are permanent and continuing. See our brief in the previous submission of the case, No. 80-590, at the October, 1980 term, p. 33 and Appendix D thereto. *Gulf does not contest these facts.*

CONCLUSION

There being no ground for review of the decision below, the petition for writ of certiorari should be denied.

Respectfully submitted,

/s/

JOSEPH D. JAMAIL
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

Counsel of Record for Respondent Steven Gaedecke

Of Counsel:

JAMAIL, KOLIUS & MITHOFF
GUS KOLIUS
JOHN B. NEIBEL
NAT B. KING
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

CERTIFICATE OF SERVICE

I, Joseph D. Jamail, a member of the bar of this Court and counsel for Steven Gaedecke, hereby certify that:

(1) All parties required to be served in this proceeding have been served;

(2) Three copies of the foregoing Brief in Opposition of Respondent Steven Gaedecke were served on counsel of record for each of the other parties separately represented in this proceeding at their respective post office addresses, viz.,

Bradley A. Jackson, Esq.
Royston, Rayzor, Vickery & Williams
2200 Texas Commerce Tower
Houston, Texas 77002;

Frank Caton, Esq.
Crain, Caton, James & Womble
Two Houston Center
Houston, Texas 77002;

(3) Service on each of such parties was made on the 14th day of September, 1982, by depositing said copies of this Brief in Opposition of Respondent Steven Gaedecke in a United States Post Office, first class postage prepaid, and addressed to the above named counsel.

/s/
JOSEPH D. JAMAIL